Supreme Court, U.S.
FILED
95 1388 FEB 28 1996
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No. 95-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ST. PAUL MERCURY INSURANCE COMPANY
and NORTH AMERICAN CONSTRUCTION
CORPORATION

Petitioners,

v.

B & D MECHANICAL CONTRACTORS, INC.

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 28, 1996

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QUESTIONS PRESENTED

1. Do the federal courts have exclusive jurisdiction of Miller Act cases?

2. Can a statutory venue provision be, simultaneously, a jurisdictional requirement?

3. Can parties through an otherwise valid forum selection clause agree to resolve their Miller Act claims in a forum other than federal district court?

4. Did the Court of Appeals correctly interpret the contract as precluding dismissal or transfer of this case?

LIST OF ALL PARTIES

B & D Mechanical Contractors, Inc.

Plaintiff-Appellant/Cross-Appellee,

North American Construction Corporation
St. Paul Mercury Insurance Company

Defendants-Appellees/Cross-Appellants

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OCTOBER TERM, 1995

ST. PAUL MERCURY INSURANCE COMPANY
and NORTH AMERICAN CONSTRUCTION
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Petitioners,

v.

B & D MECHANICAL CONTRACTORS, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, St. Paul Mercury Insurance Company ("St. Paul") and North American Construction Corporation ("North American"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on November 13, 1995.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 70 F.3d 1115 (10th Cir. 1995) (App. 1).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 13, 1995. Petitioners timely filed a Petition for Rehearing (App. 9) which was denied on December 11, 1995. (App. 18). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 40, Section 270a:

Bonds of contractors of public buildings or works.

(a) Type of bonds required. Before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.

United States Code, Title 40, Section 270b:

Rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor . . . shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him:

> (b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere.

United States Code, Title 28, Section 1352:

> Bonds executed under federal law. The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

STATEMENT OF THE CASE

On April 7, 1992, North American employed Respondent, B & D Mechanical Contractors, Inc. ("B & D"), as a subcontractor to perform a portion of the work North American, as general contractor, had agreed to perform for the United States Government. The project involved the construction of a groundwater treatment system at Tinker Air Force Base, located in Oklahoma County, Oklahoma. As required by 40 U.S.C. §270a of the Miller Act, St. Paul issued the payment bond for this public project.

The subcontract between North American and B & D contained a forum selection clause which provided that "[t]he

Subcontract Agreement and any claim arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas." (App. 23)

During construction, a dispute developed between the parties which resulted in litigation filed by B & D against North American and St. Paul on February 22, 1994. B & D's Complaint was filed in the United States District Court for the Western District of Oklahoma, the federal district which includes Tinker Air Force Base. B & D alleged breach of its subcontract with North American resulting from non-payment of amounts allegedly due and claimed a right to recover for such unpaid amounts against the payment bond issued by St. Paul.

In reliance on the forum selection clause in the subcontract, Petitioners moved to dismiss B & D's Complaint based on improper venue. On August 22, 1994, the District Court granted Petitioners' Motion to Dismiss. (App. 20).

B & D appealed the District Court's judgment to the United States Court of Appeals for the Tenth Circuit. On November 13, 1995, the Court of Appeals reversed the judgment of the District Court and remanded the case to the District Court for trial on the merits. Petitioners' timely petition for rehearing was denied on December 11, 1995.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals is contrary to the decision of this Court in F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974).

The judgment of the Court of Appeals is in conflict with the decision of another Court of Appeals: FGS Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Dec. 4, 1995) (No. 95-1102).

This case is of national importance. The Miller Act applies to hundreds if not thousands of transactions on an annual basis. Contractors on public projects employing numerous suppliers and subcontractors, both local and out-of-state, must be able to assess the risk of burdensome litigation in a foreign jurisdiction and the continued viability of forum selection clauses first recognized as valid in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). The fundamental issue in this case is the enforceability of private agreements related to the place and manner in which parties are willing to resolve their commercial disputes.

I. The Decision of the Court of Appeals Is In Conflict with This Court's Decision in Rich and Other Courts of Appeals

The Miller Act, 40 U.S.C. §§270a-d, requires the general contractor on any public project to post both a performance bond and a payment bond. 40 U.S.C. §270a(a). In Section 270b(a) of the Act, suppliers and subcontractors of the general contractor are granted the right to sue on such payment bond for any unpaid amount.[1] Section 270b(b), the focus of this appeal, provides that such suits

> shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere.

Interpreting this language in F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974), this Court held "§270b(b) is merely a venue requirement." Id. at 125.

In the Opinion below, the Court of Appeals recognized the holding in Rich and acknowledged that even prior to that decision "courts deciding the issue had held almost without exception that [Section 270b(b)] was a venue

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[1]United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705, at n. 3 (2nd Cir. 1966), *cert. dismissed*, 385 U.S. 924.

provision." (App. 5). Nonetheless, the Court concluded that Section 270b(b) "grants federal courts exclusive jurisdiction." (App. 6).[2] This holding is contrary to Rich.

To support its Opinion, the Court of Appeals cites two decisions: one from its own Circuit and one from the Seventh Circuit. In United States ex rel. General Rock & Sand Corp. v. Chuska Dev. Corp., 55 F.3d 1491 (10th Cir. 1995), a different panel of the Tenth Circuit held that a letter of credit required by an Indian Housing Authority was not a "payment bond", consequently, the Miller Act did not apply. Prior to deciding this issue, the Court, in dicta, wrote that Section 270b(b) of the Miller Act "grants the federal district courts exclusive jurisdiction over such actions." Id. at 1493. This dicta in Chuska is also contrary to Rich.

Likewise, the other case cited by the Court of Appeals does not support the conclusion that federal courts have exclusive jurisdiction of Miller Act claims. In United

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[2]While the Court of Appeals does not specifically reference any portion of the Miller Act to support its holding, Section 270b(b) is the only one which the Court did discuss or to which it could have had reference. Section 270a refers only to the bonding requirements and does not contain any grant of jurisdiction. Section 270b(a) grants a private right of action against the bond to unpaid suppliers, subcontractors and parties contracting with them but does not contain any reference to jurisdiction or the courts in which such suits are authorized to be brought. Likewise, the other two sections of the Miller Act, Sections 270c and d, do not relate to jurisdiction and, thus, could not support the Court of Appeals decision.

States ex rel. Owens-Corning Fiberglass Corp. v. Brandt Constr. Co., 826 F.2d 643 (7th Cir. 1987), *cert. denied*, 484 U. S. 1026 (1988), the issue was whether the underlying state court case had been properly removed. The Seventh Circuit concluded that the state case had not involved a Miller Act claim, therefore, no federal question jurisdiction could support removal. Consequently, discussion of the Miller Act in Owens-Corning is also dicta. In the course of its Opinion, however, the Seventh Circuit assumed for the purpose of argument that a Miller Act claim existed, and concluded removal would have still been improper under the derivative jurisdiction theory because "federal courts unanimously have read [Section 270b(b)] as establishing that jurisdiction of Miller Act claims is exclusively federal." Id. at 645.

Although writing after Rich, the Seventh Circuit does not discuss that decision. Instead, it cites four Circuit Court cases to support the proposition that Miller Act jurisdiction is exclusively federal. All of those cases predate Rich. Further, only two of the cases actually decide the issue.[3] Both of those cases, United States Fidelity & Guaranty Co. v. Hendry Corp., 391 F.2d 13, at n. 3 (5th Cir. 1968), *cert. denied*, 393 U.S. 978 and Koppers Co. v. Continental

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[3]In both of the other cases, Blanchard v. Terry & Wright, Inc., 331 F.2d 467 (6th Cir. 1964), *cert. denied*, 379 U.S. 831; and United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co., 297 F.2d 665 (2nd Cir. 1962), the Courts found that although the claims at issue were based on the Miller Act, jurisdiction was predicated on 28 U.S.C. §1352 because Miller Act payment bonds are bonds executed under any law of the United States.

Casualty Co., 337 F.2d 499, at 505-506 (8th Cir. 1964), acknowledged a split of authority on the issue but chose to follow the cases holding Section 270b(b) was a jurisdictional rather than a venue provision.

To the extent there was uncertainty in the Circuit Courts as to whether Section 270b(b) was a jurisdictional or venue provision when Hendry and Koppers were decided, that uncertainty was resolved by this Court in Rich. This effect is most apparent in the Eighth Circuit. That Court, deciding Koppers ten years before Rich concluded, after careful analysis, that federal courts have exclusive jurisdiction over Miller Act cases. That same Circuit deciding FGS Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Dec. 4, 1995) (No. 95-1102), twenty years after Rich held that "a federal court does not have exclusive jurisdiction over . . . Miller Act claims."[4]

Likewise, in the Fifth Circuit which decided the Hendry case, the Court is now committed to the proposition that Section 270b(b) is a venue provision and that it can be waived by general contractors and their Miller Act sureties.

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[4]Id. at 1233. The competing forum in Carlow was a tribal court, however, that distinction was not determinative of the outcome. Consequently, the holding that federal courts have concurrent jurisdiction over Miller Act claims applies with equal force whether the alternative forum is a state court or a tribal court.

In re Fireman's Fund Ins. Co., 588 F.2d 93 (5th Cir. 1979).[5] Fireman's Fund affirmed the transfer of a Miller Act case to the venue specified in a forum selection clause even though Section 270b(b) provided for a different venue.

Even in the Second Circuit, which decided the Bryant case cited in Owens-Corning, the jurisdictional nature of Section 270b(b) has been revisited. In United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2nd Cir. 1966), *cert. dismissed*, 385 U. S. 924, the Second Circuit noted that Bryant had not decided whether Section 270b(b) was a venue requirement or a jurisdictional limitation. Despite dicta to the contrary in Bryant, the Capolino court held the statute was "a venue provision benefiting defendants in some cases." Id. at 707. It is not without significance that this Court's Opinion in Rich cited Capolino with approval and not Bryant. Rich, id. n. 10.

Consequently, the decision of the Tenth Circuit which is the subject of this appeal is not supported by the authority on which it purports to rely. It is also contrary to this Court's decision in Rich, and to decisions from other courts of appeal.

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[5]In addition, the Ninth Circuit has adopted the position of the dissent in Hendry. United States ex rel. Aurora Painting, Inc., v. Fireman's Fund Ins. Co., 832 F.2d 1150 (9th Cir. 1987). That case held that a state court judgment had preclusive effect in a subsequent action against the contractor's Miller Act surety.

The four courts of appeal which have decided this issue are split: the decision in this case holding federal jurisdiction is exclusive, the Eighth Circuit decision in Carlow, holding that federal court jurisdiction is not exclusive; United States ex rel. Pittsburgh Tank & Tower v. G & C Enterprises, Inc., 62 F.3d 35 (1st Cir. 1995), enforcing a forum selection clause and dismissing a Miller Act claim; and United States ex rel. Harvey Gulf International Marine, Inc. v. Maryland Casualty Co., 573 F.2d 245 (5th Cir. 1978).

Although decided after Rich, Maryland Casualty does not discuss Rich nor cite to any authority when it holds that "jurisdiction over Miller Act claims is exclusively federal." Id. at 247. The Court appears to rely on Section 270b(b). However, in light of Rich, jurisdiction of Miller Act claims cannot be premised on Section 270b(b).

Equally noteworthy is the fact that Maryland Casualty does not follow a prior decision of the Fifth Circuit, Texas Constr. Co. v. United States ex rel Caldwell Foundry and Machine Co., Inc., 236 F.2d 138 (5th Cir. 1956). That case purports to be the first federal decision on the issue and held that Section 270b(b) was a venue provision as distinguished from a jurisdictional requirement. Texas Construction is cited for that proposition by the Maryland Casualty court, however, there is no discussion of why Texas Construction is not controlling.

Finally, the Maryland Casualty decision is further questionable in light of the Fireman's Fund case decided the following year with an opposite result. Even if correct in

result, Maryland Casualty is distinguishable because the surety in that case objected to venue. Here, the surety seeks to enforce the parties' agreement as to venue.

The Court of Appeal's decision in this case, although consistent with one of the three Fifth Circuit decisions deciding this issue is contrary to every other court of appeals decision. It is contrary to the implicit resolution of this issue in Rich, and it is contrary to the express intent of Congress in 28 U.S.C. §1352. Consequently, reversal is required.

In addition, the decision of the Court of Appeals so far departs from existing case law that if allowed to stand it will return jurisprudence regarding jurisdiction and venue to the"confusing deviation" that once attended these principles. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939). The Court of Appeals concluded that the statutory language Rich held to be a venue provision was also a jurisdictional requirement. The law cannot be that specific language providing for the venue of actions is, at the same time, jurisdictional without disregarding years of accepted jurisprudence.

In fact, the law is to the contrary.

> The jurisdiction of the federal courts - their power to adjudicate - is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit - the place where judicial authority may be exercised - though defined by legislation relates to the convenience of

> litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts.

Neirbo, id. at 308 U.S. 167-168. If, as Rich held, Section 270b(b) is a venue provision relating to the convenience of the litigants and subject to their disposition, it cannot also be an exclusive grant of subject matter jurisdiction. The latter is beyond the scope of the litigants to confer by agreement, alter by contract or waive by failure to object.

The cases concluding that Section 270b(b) is a venue provision have uniformly found the purpose of that statute to be for the convenience of defendants. See, e.g. Capolino, 364 F.2d at 707. In this respect, it is like the general venue statute which "does not limit the general jurisdiction of the District Courts, or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election." Lee v. Chesapeake & O. Ry. Co., 260 U.S. 653, 655 (1923). If 270b(b) is a provision which the Petitioners may assert or waive, it cannot be jurisdictional.

A. Legislative History of The Miller Act Supports Reversal

An examination of the legislative history of the Miller Act also supports the conclusion that jurisdiction of Miller Act claims is not exclusively federal. The predecessor of the Miller Act, the Heard Act, was enacted in 1894. 28 Stat. 278. That statute required a single bond which would ensure

the contractor's performance to the United States and prompt payment of persons supplying labor and materials. In part, the statute provided that:

> Said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties.

Clearly the language of the Heard Act, as originally enacted, did not provide for exclusive federal jurisdiction. Hendry, 391 F.2d at 18.

Further, a review of reported decisions confirms that the Heard Act of 1894 was not treated as creating exclusive federal jurisdiction. See, for example, United States ex rel. Standard Furniture Co., v. Henningsen, 82 P. 171 (Wash. 1905), affirming the judgment of a furniture supplier against the surety posting a bond required by the Heard Act; and, McPhee v. United States ex rel. Montrose Hardware Co., 174 P. 808 (Colo. 1918), reversing the judgment against the United States and affirming the judgment of suppliers and materialmen such that both the United States and the suppliers were permitted to pursue their claims against the sureties which had posted Heard Act bonds on the Gunnison tunnel project.

In 1905, the Heard Act was amended to make clear that the United States had priority over suppliers and subcontractors with respect to the claims against the bond. Also added was language providing that the suit of suppliers

and subcontractors was to be brought "in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere." 40 U.S.C. §270. In reliance on this language, some state courts concluded that concurrent jurisdiction no longer existed and declined to entertain Heard Act claims. E.g., Alleva v. Maryland Casualty Co., 287 N.Y.S. 583 (N.Y.S.C. 1936).

In 1935, the Miller Act replaced the Heard Act, preserving in Section 270b(b) the language of the 1905 amendment which provided for suit in the federal district court where the project was located "and not elsewhere."[6] This language precipitated decisions which assumed that Section 270b(b) was a jurisdictional provision and, therefore, that federal courts had exclusive jurisdiction of Miller Act claims. (See, e.g. Owens-Corning, and cases cited at 826 F.2d 645-646). This position is not tenable after Rich.

From the available history, it is apparent that the Miller Act was passed to rectify difficulties existing under the Heard Act. See, e.g. Stickells, Bonds of Contractors on Federal Public Works, The Miller Act, 36 B.U.L. Rev. 499 at 502-507 (1956). The Miller Act solution to these difficulties was basically twofold: 1) protect subcontractors and suppliers by requiring a payment bond separate from the performance bond which, under the Heard Act, had often been exhausted by the claims of the United States alone; and 2) with the deletion of the Heard Act requirement that all

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[6]The Heard Act had been amended in 1911 to provide for suit in the district rather than the circuit court. 30 Stat. 1167.

claimants intervene in one action, consolidate into one forum all litigation on the new payment bond for the convenience of the contractor and surety. Section 2(a) of the Miller Act, 40 U.S.C. §270a(a), accomplished the first of these goals; Section 2(b), 40 U.S.C. 270b(b), accomplished the later.

The legislative history of the Miller Act does not indicate "that the Congress intended Section 2(b) to do more than regulate the locality of actions commenced pursuant to Section 2(a) of the Act." Capolino, 364 F.2d at 708. Consequently, neither the enactment of Section 270b(b) of the Miller Act, nor the 1905 amendment to the Heard Act from which the 270b(b) language was derived altered the concurrent jurisdiction of state and federal courts.

More importantly, there is nothing in the history or policy of federal law which is inconsistent with concurrent jurisdiction regarding the prosecution of Miller Act claims in the manner originally provided for under the Heard Act. Miller Act suits are " . . . plain and simple commercial litigation." Rich, 417 U.S. at 130. And in 1948, Congress expressly provided for concurrent jurisdiction " of any action on a bond executed under any law of the United States." 28 U.S.C. §1352 (emphasis added).

Clearly, Miller Act bonds are bonds executed under a law of the United States, specifically 40 U.S.C.§270a. Several courts have so held. E.g., Bryant, 297 F.2d at 456. If a Miller Act claim is a suit on a bond executed under a law of the United States for purposes of finding federal jurisdiction under 28 U.S.C. §1352, when no 270b(b) district court exists, it must also be a suit over which state courts

have concurrent jurisdiction pursuant to that same statute despite the dicta of the Second Circuit to the contrary. See, Bryant, 297 F.2d at 456 n. 9.

B. Federal Courts Do Not Have Exclusive Jurisdiction of Miller Act Claims

The decision of the Tenth Circuit is also contrary to general federal law on the subject of jurisdiction.

> We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.

Tafflin v. Levitt, 493 U.S. 455, 458 (1990). Pursuant to what the Tafflin Court characterized, at page 459, as a "deeply rooted presumption in favor of concurrent state court jurisdiction," this Court has found exclusive federal jurisdiction to be the exception rather than the rule.[7]

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[7]For some of the cases deciding this issue, see Tafflin, holding states have concurrent jurisdiction to hear civil RICO claims arising under 18 U.S.C. §1961-1968; Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990), holding states have concurrent jurisdiction to decide federal employment discrimination cases, arising under 42 U.S.C. §2000e; Maine v.

Further, in what appears to be a comprehensive list of "standard fields of exclusive federal jurisdiction" contained in Justice Scalia's concurring opinion in Tafflin, the Miller Act is not included. Id. at 471.

While the Supreme Court has not expressly decided this issue with respect to the Miller Act, concurrent jurisdiction is implicit in, if not mandated by, the holding in Rich. Because concurrent jurisdiction is also expressly provided for by Congress in 28 U.S.C. §1352, it seems unnecessary to engage in the Tafflin analysis. Nonetheless, excluding Section 1352 and considering the Miller Act alone, the Tafflin analysis achieves the same result: jurisdiction of Miller Act claims is concurrent.

The starting point for any determination of concurrent jurisdiction is the expressed intent of Congress contained in the language of the statute at issue. Tafflin, 493 U.S. 455; Yellow Freight, 494 U.S. 820. Rich has resolved that issue in holding that Section 270b(b) is a venue provision. Consequently, it cannot be the "explicit statutory directive"

Thiboutot, 448 U.S. 1 (1980), holding states have concurrent jurisdiction to hear federal civil rights claims arising under 42 U.S.C. §1983; Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), holding states have concurrent jurisdiction to hear claims arising under Section 301 of the Federal Labor Relations Act, 29 U.S.C. §185; Yates v. Jones National Bank, 206 U.S. 158 (1907), holding states have concurrent jurisdiction to decide national banking issues; and, Claflin v. Houseman, 93 U.S. 130 (1876), holding states had concurrent jurisdiction over certain federal bankruptcy issues prior to the amendment of 28 U.S.C. §1334(a) expressly giving federal courts exclusive jurisdiction of these issues.

of exclusive federal jurisdiction required by Tafflin and Yellow Freight. No other provision of the Miller Act contains any discussion of jurisdiction much less the expressed intent of Congress sufficient to rebut the "deeply rooted" presumption in favor of concurrent jurisdiction.

As previously demonstrated, there is nothing in the legislative history of the Miller Act which suggests that Congress intended for the federal courts to be the only forum in which Miller Act claimants could pursue their claims.

Even the incompatibility factors discussed in Tafflin support concurrent jurisdiction. As the Rich court noted, a Miller Act case is nothing more than common, ordinary commercial litigation. Federal courts have no particular expertise in resolving construction contract disputes, nor disputes between general contractors and their suppliers and subcontractors. State courts regularly decide these issues, both with respect to lien claimants and in cases where state law requires a Miller Act type payment bond. State courts regularly decide these cases with no less "hospitality" than federal courts.

Uniformity of interpretation is provided by the payment bond. Depending on the facts of each particular case, any unpaid supplier or subcontractor who proves entitlement to payment will be paid, at least by the surety. Because the facts of each case will determine the outcome, and because those facts will generally differ from case to case, additional uniformity is achievable only if one judge is designated to decide all Miller Act claims.

Further, it is inconceivable that Congress considers state courts competent to adjudicate every case filed on any bond issued under any law of United States except the Miller Act. See, 28 U.S.C. §1352. As in Tafflin, it would also seem inconceivable that an arbitrator would be considered competent to resolve a Miller Act claim but a state court judge would not.[8] Tafflin, 493 U.S. at 466. To the extent federal law controls in a Miller Act case, that law can be applied with equal force by a state court judge and facilitate the federal right of action granted in Section 270b(a). Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, at 478, n. 4 (1981); Free v. Bland, 369 U.S. 663 (1962).

Finally, like the RICO statute at issue in Tafflin, the Miller Act is remedial in nature and should be liberally construed.[9] Therefore, concurrent state court jurisdiction over Miller Act claims will "advance rather than jeopardize

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[8]While this Court has not specifically decided the enforceability of arbitration clauses in Miller Act cases, there is little doubt that they are enforceable. Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987), enforcing arbitration clauses in RICO cases; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), enforcing arbitration clauses in antitrust cases; Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), enforcing arbitration clauses in 1934 Act securities cases; and Capolino, 364 F.2d at 705 (1966), *cert. denied*, 385 U.S. 924 (1966), enforcing an arbitration clause in a Miller Act case.

[9]Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co., 322 U.S. 102 (1944); Fleisher Engineering & Constr. Co. v. United States ex rel. Hallenbeck, 311 U.S. 15 (1940).

federal policies underlying the statute." Tafflin, 493 U.S. at 467.

Consequently, even though the clear implication of Rich is that federal and state courts have concurrent jurisdiction of Miller Act claims, it appears that if this issue were expressly decided, concurrent jurisdiction would also be the result.

II. Interpretation Of This Forum Selection Clause Requires Reversal

In order to reach its result in this case, the Court of Appeals interpreted the contract language at issue to designate the state court in Bexar County, Texas, as the only court in which suit could be brought. With this interpretation, the Court of Appeals did not believe this case could be transferred to the United States District Court for the Western District of Texas, the federal court having jurisdiction over Bexar County. 28 U.S.C. §124(d)(4).

The contract provides in paragraph 35(c): "The Subcontract Agreement and any claims arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas." The contract language does not contain the words "state court," leaving open to interpretation the meaning of this language. Several courts have interpreted the same or similar language and reached different results as to whether the language

refers to state and federal courts or state courts only.[10] The parties to this appeal differ on their interpretation of this language.

B & D appealed the District Court's dismissal pursuant to Rule 12(b)(3), arguing that North American's Motion to Dismiss should be analyzed as a motion to transfer based on the convenience of the parties under 28 U.S.C. §1404(a). Citing Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988), B & D took the position that the language at issue should be interpreted as referring to state or federal court and Section 1404(a) should apply because the Western District of Texas was a district where the original action "might have been brought." Under the balancing test applied in Stewart to Section 1404(a) motions,

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[10]Cf. Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342 (10th Cir. 1992), holding removal pursuant to 28 U.S.C. §1441 et. seq. was improper where the contract provided that "venue shall be proper . . . in Johnson County, Kansas"; Pittsburgh Tank, 62 F.3d at 36, treating a forum selection clause providing for venue in Burlington County, New Jersey as permitting transfer to the federal court having jurisdiction over Burlington County even though the physical location of the federal court for the District of New Jersey is located in a different county, 28 U.S.C. §110; and Arrow Plumbing and Heating, Inc. v. North American Mechanical Services Corp., 810 F.Supp. 369 (D.R.I., 1993) where the parties treated this identical language as referring to the state or federal court in Texas. In that case, the court held that a motion to transfer for improper venue, under §1406(a) rather than for convenience of the parties under §1404(a), is appropriate where the moving party seeks to enforce a contractual forum selection clause.

B & D contended that the factors favoring retention of the case outweighed those favoring transfer.

Although the meaning of this language had not been an issue in the District Court, (App. 20), North American responded arguing that Stewart did not apply for two reason: First, no 1404(a) motion to transfer had been filed. Second, the contract should be construed as designating a state court forum which would render Section 1404(a) inapplicable.

Clearly, the parties disagreed on their interpretation of the contract language, raising an issue of fact. While construction of contracts is a matter of law, interpretation of contracts is a question of fact dependent on the intent of the parties. Nunn v. Chemical Waste Management, Inc., 856 F.2d 1464, at 1467 (10th Cir. 1988). Consequently, the Court of Appeals "interpretation" of the contract language resulted from impermissible fact finding by an appellate court. Because this erroneous conclusion was the sole basis on which the Court of Appeals reached the result in its Opinion reversing dismissal by the District Court, the decision of the Court of Appeals must be reversed.

Further, and regardless of the interpretation of this contract, it is undisputed that the parties, by this language, did not intend to litigate in Oklahoma. "It is fundamental that a contract shall receive that interpretation which would best effectuate the manifest intention of the parties." Socony Mobil Oil Co. v. Humble Oil & Refining Co., 387 F.2d 155, 157 (10th Cir. 1967). The Court of Appeals' interpretation ignores this principle.

North American moved to dismiss this case pursuant to Rule 12(b)(3). At oral argument and in supplemental briefing, when B & D first raised the exclusivity of federal court jurisdiction over Miller Act cases, North American acknowledged that as an alternative to dismissal, there was authority for the Court of Appeals to transfer this case to the Western District of Texas. See e.g. Pittsburgh Tank, 62 F.3d at 36, and Arrow Plumbing, 810 F.Supp. at 371.

Regardless of its interpretation of the contract, North American indicated its willingness to try this case in the Western District of Texas if dismissal would somehow result in injustice to B & D. If, as the Court of Appeals concluded, this forum selection clause designates state court as the exclusive forum for the parties' litigation, the only result that cannot be obtained is for this case to be remanded for trial in Oklahoma.

In Pittsburgh Tank, the First Circuit affirmed the dismissal of the subcontractor's claim on the basis of a forum selection clause which provided for a forum inconsistent with Section 270b(b). The Court decided against transfering the case pursuant to 28 U.S.C. §1406(a) because the subcontractor did not request that relief. The Court observed that even if enforcement of the forum selection clause to which the subcontractor had agreed resulted in the loss of its Miller Act claim, the subcontractor could still sue on the subcontract under state law without the Miller Act claim.

By implying that the subcontractor could not pursue its Miller Act claim in state court, the First Circuit does not

appear to have considered the impact of 28 U.S.C. §1352, specifically authorizing state court actions on federal bonds. It is not clear whether this issue was raised in Pittsburgh Tank. However, North American specifically argued the availability of Section 1352 as a basis for state court jurisdiction. The Court of Appeals did not address or discuss this issue but obviously rejected the argument in concluding that Miller Act jurisdiction was exclusively federal.

This conclusion, however, cannot result in remand as ordered by the Court of Appeals. Previous decisions of this Court affirm the "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). A forum selection clause designating a state court forum only is indistinguishable from an agreement to arbitrate which this Court considers "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).[11]

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[11]By analogy, this forum selection clause would posit the situs of suit in Bexar County, however, the procedure would still be primarily federal. In n. 13 of Scherk, this Court considered the application by implication of the law of the forum. In the Miller Act context, federal law would still be applied by a state court in resolving issues related to the federal right of action created by that statute. See Rich, 417 U.S. 116; Free v. Bland, 369 U.S. 663.

Assuming the Court of Appeals is correct and federal courts have exclusive jurisdiction over Miller Act claims, there is no reason why a party may contract as in Mitsibushi to resolve by arbitration in Japan federal antitrust claims over which federal courts have exclusive jurisdiction, but could not agree to resolve Miller Act claims in a state court. The enforcement of the arbitration agreement in Scherk is also indistinguishable from this case even though federal courts have exclusive jurisdiction of actions under the Securities Exchange Act of 1934.

Paragraph 35c of the subcontract at issue in this case does not confer jurisdiction on the federal courts by agreement of these parties. There is no question that the federal courts have the power to adjudicate Miller Act claims. To the extent Neirbo is relied on by the Court of Appeals for the proposition that parties cannot confer jurisdiction, it is not applicable.

Further, these parties have not agreed to forego the substantive rights afforded by the Miller Act. They have only agreed to submit them to a state rather than a federal forum. Cf. Mitsubishi, 473 U.S. at 628. Certainly, this contract does not confer on the State Court of Bexar County, Texas, jurisdiction to decide this contract dispute which that Court was not empowered by the Constitution of Texas to resolve.

If, as the Court of Appeals concluded, these parties agreed to resolve their disputes in Texas State Court, to the exclusion of any other judicial forum, affirmance of the District Court's dismissal, not remand for trial in Oklahoma,

is required. Pittsburgh Tank, 62 F.3d at 37.[12] Elimination of inconvenience and uncertainty through agreements in advance of litigation on an acceptable forum for that litigation is no less an "indispensable element" of interstate trade than of international trade. See Scherk, 417 U.S. at 518. "[E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." Stewart, 487 U.S. at 33, Kennedy, J. concurring.

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[12]As in Pittsburgh Tank, B & D has not, and could not, show any reason why it would be unable to pursue its claims for non-payment in Texas state courts. In Jim Cooley Construction, Inc. v. North American Construction Corp. and St. Paul Mercury Insurance Co., Case No. CIV-93-1813, decided by the District Court for the Western District of Oklahoma prior to the B & D case, North America's motion to dismiss based on the same forum selection clause was also granted. Cooley refiled its claim in Texas State Court. The case was resolved by settlement prior to the scheduled trial date.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 1996

APPENDIX

APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES for the use of B & D MECHANICAL CONTRACTORS, INC., an Oklahoma corporation,

Plaintiff-Appellant and Cross-Appellee,

v.

Nos. 94-6448 & 94-6355

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation, and NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants-Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-94-2540-W)

Kent Frates and Kurt M. Rupert of Hartzog Conger & Cason, Oklahoma City, for Plaintiff-Appellant and Cross-Appellee.

John F. Fischer (Don G. Holladay with him on the briefs) of Andrews Davis Legg Bixler Milsten & Price, Oklahoma City, Oklahoma, for Defendants-Appellees and Cross-Appellants.

Before MOORE, ANDERSON and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

This case addresses whether a valid forum selection clause can override the venue provisions of the Miller Act, 40 U.S.C. §270b(b). We hold that it does but find the forum selection clause at issue in this case invalid. The district court's order dismissing the case for lack of venue is reversed.

North American Construction Corporation (hereinafter "North American") contracted with the United States to install part of a ground water treatment system at Tinker Air Force Base in Midwest City, Oklahoma. St. Paul Mercury Insurance Company (hereinafter "St. Paul") provided the payment bond to North American for the project. B & D Mechanical Contractors, Inc. (hereinafter

"B&D") entered into a subcontract with North American to provide labor and services in the completion of the water treatment system. The subcontract contained a forum selection clause stating: "The Subcontract Agreement and any claims arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas."

B&D filed claims against North American and St. Paul under the Miller Act, 40 U.S.C. §270a-c, and for breach of contract, in the United States District Court for the Western District of Oklahoma. North American and St. Paul moved to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3). The district court granted the motion to dismiss holding that the Miller Act's venue provision was waived by the subcontract's forum selection clause. B&D appealed. North American and St. Paul cross-appealed the district court's order denying them attorney's fees.

II.

B&D raises three issues on appeal: (1) whether the district court erroneously concluded that the forum selection clause in the subcontract mandated the case be brought in Bexar County, Texas; (2) whether the district court improperly resolved a factual issue against B&D in its ruling on North American's and St. Paul's Motion to Dismiss for Improper Venue; and (3) whether enforcing the forum selection clause would be unreasonable under the facts and circumstances of this case.

III.

B&D contends the district court erred in granting North American's and St. Paul's Motion to Dismiss for Improper Venue. We review a motion to dismiss based on the validity of a forum selection do novo. *Riley v. Kingsley Underwriting Agency, Ltd.*, 969 F.2d 953, 957 (10th Cir.), *cert. denied*, 113 S. Ct. 658 (1992).

The interpretation of the Miller Act's venue provision in relation to a forum selection clause is an issue of first impression in the Tenth Circuit. Congress enacted the Miller Act to protect persons who supply labor and materials for the construction of federal buildings. Due to its remedial nature it is afforded a liberal construction. *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 216 (1957).

Although the language of the Miller Act, 40 U.S.C. §270b(b), requiring that suits be brought in the judicial district where the contract was performed "and not elsewhere" seems to mandate strict conformance, judicial interpretation holds otherwise. While dealing with the merits of another issue, the Supreme Court characterized § 270b(b) as being "merely a venue requirement." *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 125 (1974). In *United States ex rel. Pittsburgh Tank & Tower, Inc. v. G&C Enterprises, Inc.*, 62 F.3d 35, 36 (1st Cir. 1995), the court held a contractual forum selection clause prevailed when it conflicted with the venue designated by the Miller Act. The *G&C Enterprises* court noted that even though the Supreme Court was not addressing a

conflicting forum selection clause in *F.D. Rich*, the Court's designation that the statutory language was a mere venue requirement was "explicit and very hard for a lower federal court to ignore." *Id* at 36. This court also finds such a designation hard to ignore. Interestingly, even prior to the *F.D. Rich* decision, courts deciding the issue had held almost without exception that the provision was a venue requirement. *United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705, 707 (2d Cir.), *cert. denied*, 385 U.S. 924 (1966). It is well settled that venue provisions are subject to contractual waiver. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964).

Three circuits have addressed forum selection clauses that conflict with the Miller Act's venue provisions. All three have held that as a mere venue requirement, § 270b(b) is subject to contractual waiver by a valid forum selection clause. *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (holding the Miller Act's venue requirement could be waived by defendants); *G&C Enterprises*, 62 F.3d at 36; *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (holding the case for overriding the Miller Act particularly strong where forum selection clause was suggested by defendants -- the parties the act was designed to protect).

We are persuaded by our sister circuits and agree that a valid forum selection clause supersedes the Miller Act's venue provision. This case thus turns on whether the forum selection clause at issue is valid. To interpret a contract we

"must give a written agreement that interpretation which was intended by the parties." *Ader v. Hughes*, 570 F.2d 303, 309 (10th Cir. 1978). The clause at issue states that any claims arising under the contract shall be governed by Texas state law "and exclusive venue shall be proper in Bexar County, Texas." Those parties to this appeal, St. Paul and North American, urging us to apply the forum selection clause, state in their brief that "the contract at issue in this case designates a state court forum only." The parties selection of a state court forum is fatal to the clause's enforceability.

Although parties are able to contractually alter the Miller Act's venue provision, they are not able to change its jurisdictional requirements. As Justice Frankfurter stated in *Neirbo Co. v. Bethlehem Shipbuilding Corp.* 308 U.S. 165 (1939):

> The jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit -- the place where judicial authority may be exercised -- though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.

Id. at 167-68. The Miller Act grants federal courts exclusive jurisdiction. *United States v. Brandt Constr. Co.*, 826 F.2d 643, 645 (7th Cir. 1987) (discussing how federal courts have unanimously held Miller Act jurisdiction to be exclusively federal), *cert. denied*, 484 U.S. 1026 (1988).

See also United States ex rel. General Rock & Sand Corp. v. Chuska Dev. Corp., 55 F.3d 1491, 1493 (10th Cir. 1995). In a supplemental brief, St. Paul and North American suggest the federal district court for the Western District of Texas as an alternate forum; however, neither they nor we can rewrite the subcontract to choose a valid forum for them. Therefore, this forum selection clause which attempts to divest the federal courts of their exclusive jurisdiction to hear this case is void and unenforceable.

Because the forum selection clause is invalid, the Miller Act's venue provisions prevail and this case must be brought in the United States District Court for the Western District of Oklahoma, the federal district where the contract was to be performed.

The invalidity of the forum selection clause renders B&D's other assertions moot.

Our reversal of the district court's dismissal for improper venue renders North American's and St. Paul's cross-appeal moot. As they are no longer the "prevailing parties" within the meaning of the attorney fee provision or the subcontract on this issue, they are clearly not entitled to attorney's fees regardless of any contractual interpretation.

IV.

We find the forum selection clause to be an invalid waiver of the Miller Act's venue provision. The district

court's judgment is REVERSED and this case is REMANDED to the district court for a trial on the merits.

Our holding renders North American's and St. Paul's cross-appeal moot.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES for the use of B & D MECHANICAL CONTRACTORS, INC., an Oklahoma corporation,

Plaintiff-Appellant,
Cross-Appellee,

No. 94-6348
v. No. 94-6355
(D.C. No. CIV-94-0254-W)

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation, and NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants-Appellees,
Cross-Appellants.

PETITION FOR REHEARING

St. Paul Mercury Insurance Company ("St. Paul") and North American Construction Corporation ("North American") (collectively "Appellees"), pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 40 of the Rules of the United States Court of Appeals for the Tenth Circuit, petition the Court for Rehearing of the Judgment entered in this case on November 13, 1995, for the following reasons:

1. The court has misconstrued the jurisdiction of the federal courts in Miller Act cases.

2. The court has misapprehended the intent of the parties to this contract.

Because the issue decided by this Court was not raised by Appellant until oral argument, it has not been fully briefed and Appellees submit, therefore, that rehearing is appropriate.

I.
FEDERAL COURTS DO NOT HAVE EXCLUSIVE JURISDICTION OF MILLER ACT CLAIMS

> "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. . . . As we noted in Claflin, 'if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction . . . .'"

Tafflin v. Levitt, 493 U.S. 455, 458-459 (1990). Pursuant to what the Tafflin Court characterized, at page 459, as a "deeply rooted presumption in favor of concurrent state court jurisdiction," the Supreme Court has found exclusive federal court jurisdiction to be the exception rather than the rule.[1]

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[1]For some of the cases deciding this issue, see Tafflin, holding states have concurrent jurisdiction to hear civil RICO claims arising under 18 U.S.C. §1961-1968; Yates v. Jones National Bank, 206 U.S. 158 (1907), holding states have

The Supreme Court has not decided this issue with respect to the Miller Act, and only three Courts of Appeal have. Other than the decision in this case, this issue was most recently decided by the Eighth Circuit in FGS Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995), a case cited as persuasive authority by this Court. Carlow, however, held that "a federal court does not have exclusive jurisdiction over . . . Miller Act claims."[2]

In deciding that the Miller Act grants federal courts exclusive jurisdiction (Opinion p. 6), this Court did not distinguish Carlow. Instead, this Court cited a decision of the Seventh Circuit and an earlier decision of the Tenth

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concurrent jurisdiction to decide national banking issues; Claflin v. Houseman, 93 U.S. 130 (1876), holding states had concurrent jurisdiction over certain federal bankruptcy issues prior to the amendment of 28 U.S.C. §1334(a) expressly giving federal courts exclusive jurisdiction of these issues; Maine v. Thiboutot, 448 U.S. 1 (1980), holding states have concurrent jurisdiction to hear federal civil rights claims arising under 42 U.S.C. §1983; Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990), holding states have concurrent jurisdiction to decide federal employment discrimination cases, arising under 42 U.S.C. §2000e; and, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), holding states have concurrent jurisdiction to hear claims arising under Section 301 of the Federal Labor Relations Act, 29 U.S.C. §185.

[2]64 F.3d at p. 1233. The competing court in Carlow was a tribal court, however, that distinction was not determinative of the outcome. Consequently, the holding that federal courts have concurrent jurisdiction over Miller Act claims applies with equal force whether the alternative forum is a state court or a tribal court.

Circuit to support this proposition. Neither case, however, decided this issue. The Tenth Circuit case, held that a letter of credit required by an Indian housing authority was not a "payment bond" required by the Miller Act; consequently, "the Miller Act [did] not apply." General Rock & Sand Corp. v. Chuska Development, 55 F.3d 1491 (10th Cir. 1995).

Chuska does contain the statement that Section 270b(b) of the Miller Act grants federal courts exclusive jurisdiction. However, if that issue was before the Court, it was mooted by the holding that the Miller Act did not apply. Most importantly, this statement is absolutely contrary to controlling authority of the United States Supreme Court as well as the holding of this court in this case. (See Opinion pp. 4-5). In F.D. Rich Co. v. Industrial Lumber, 417 U.S. 116 (1974), the Supreme Court held, at p. 125, that " . . . §270b(b) is merely a venue requirement." Therefore, Section 270b(b) is not a grant of jurisdiction, exclusive or otherwise.

Owens-Corning Fiberglass v. Brandt Construction Company, 826 F.2d 643 (7th Cir. 1987), the other Circuit case cited by this court, did not decide this issue either. Brandt also held that the case before it was not based on the Miller Act. In reaching this determination, the court observed, at page 645, that many courts had found Section 270b(b) to be a grant of exclusive jurisdiction to the federal courts. Each of the cases cited by Brandt was decided before the Supreme Court's 1974 decision in Rich. Consequently, their reliance on Section 270b(b) as a jurisdictional provision cannot stand.

Since 1974, the only other Circuit Court to decide this issue is the Fifth Circuit. See, United States v. Maryland Casualty Company, 573 F.2d 245 (5th Cir. 1978). Although decided after Rich, Maryland Casualty does not cite to any authority when it holds that " . . . jurisdiction over Miller Act claims is exclusively federal." (573 F.2d at p. 247). It appears to rely on Section 270b(b). However, in light of Rich, exclusive federal jurisdiction of Miller Act claims cannot be premised on Section 270b(b).

Because Section 270b(b) is a venue provision, the grant of jurisdiction to federal courts to hear Miller Act claims must come from some other provision. Section 270a does not do so. That Section establishes the requirement under federal law for performance and payment bonds on certain government construction projects. Section 270b(a) grants to subcontractors and suppliers a right of action to sue on the payment bond required by Section 270a: "Every person who has furnished labor or material . . . shall have the right to sue on such payment bond." However, if this is a grant of jurisdiction to the federal courts, it is by implication. Without question, there is no express reservation necessary for exclusive jurisdiction in this provision. Tafflin, supra.[3]

There is an express grant of jurisdiction to the federal courts to hear Miller Act claims in 28 U.S.C. §1352.

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[3]The other provisions of the Miller Act are not relevant to this issue and provide no basis for jurisdiction.

> "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title."

Clearly, an action on the payment bond required by Section 270a is an "action on a bond executed under any law of the United States". Likewise, Section 1352 settles any doubt about the concurrent jurisdiction of state courts to decide the " . . . plain and simple commercial litigation" involved in Miller Act claims. Rich, supra at p. 130.

II.
INTERPRETATION OF THIS FORUM SELECTION CLAUSE IS NOT DISPOSITIVE

In reversing the lower court's decision, this Court held that the parties' selection of a state court forum is fatal to the forum selection clause's enforceability. (Opinion p. 5). This decision rests on the conclusion that the parties intended through the forum selection clause at issue to designate the state court in Bexar County, Texas, exclusive of the federal court there as the only forum for litigation.

In responding to appellants' argument that this case should be decided under 28 U.S.C. § 1404, North American argued that this forum selection clause should be construed to designate a state court forum. However, there was no determination by the District Court to that effect nor was the determination of that issue necessary to resolve Appellees' Motion to Dismiss. The District Court upheld the forum selection clause based on the premise that such clauses are prima facie valid and are enforceable unless enforcement

would be unreasonable. Order at p. 3. Appellant was then free to refile its case in state or federal court in Texas.

While North American's construction of the forum selection clause as designating a state court forum is supported by case law[4] other courts have interpreted the same language as designating a state or federal court. See U.S. on Behalf of Pittsburgh Tank & Tower, Inc. v. G & C Enterprises, Inc., 62 F.3d 35, at p. 36 (1st Cir. 1995).

Most significantly, the identical language in a contract with another North American subcontractor has been interpreted by the United States District Court for the District of Rhode Island to permit transfer of a Miller Act case under 28 U.S.C. §1406(a) to the United States District Court for the Western District of Texas. Arrow Plumbing and Heating, Inc. v. North American Mechanical Services Corp., 810 F.Supp. 369 (D.R.I., 1993).

Regardless of whether the language of this contract evidences an intent to litigate in state or federal court or in state court only, it is absolutely clear that the parties did not intend to litigate in Oklahoma.

At oral argument, Appellees indicated their willingness for this court to affirm the dismissal or transfer this case to the Western District of Texas, the federal court having jurisdiction over Bexar County. Regardless of the court's construction of the contract language, this Court has authority under 28 U.S.C. §1406 to transfer the case to the Western District of Texas, in the "interest of justice".

---

[4]For example, see Lambert v. Kysar, 983 F.2d 1110 (1st Cir. 1993).

If the case were dismissed, it is possible that refiling of B & D's Miller Act claim could be precluded by the one-year jurisdictional statute of limitations. Appellees moved to dismiss, not to deprive B & D of its Miller Act claim but to enforce their agreement with B & D to litigate in Bexar County, Texas. To avoid that potential result, even though dismissal is proper, North American and St. Paul, as they stated at oral argument, are willing to litigate in the Federal District Court for the Western District of Texas even if their contract designates the State Court there as the proper forum. This result is consistent with the parties' agreement, this Court's authority under Section 1406 and the result in Arrow Plumbing, supra.

CONCLUSION

B & D's argument that this forum selection clause is improper because it ousts a court of jurisdiction has been criticized as a "vestigial legal fiction." Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 12 (1972). Although B & D has not made the argument, if enforcement of this clause would be unreasonable or unjust in that dismissal would result in the loss of B & D's Miller Act claim; transfer under Section 1406 would prevent that result. No other reason has been put forth which would provide a ". . . basis for concluding that it would be unfair, unjust or unreasonable to hold [B & D] to his bargain." Bremen, supra, at p. 18.

WHEREFORE, Appellees submit that the Judgment of the District Court should be affirmed or that the case should be remanded for transfer to the United States District Court for the Western District of Texas.

/s/_____
JOHN F. FISCHER, OBA #2927
DON G. HOLLADAY, OBA #4292
of
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ATTORNEYS FOR
DEFENDANTS-APPELLEE,
CROSS-APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of November, 1995, a true and correct copy of the foregoing document was placed in the United States Mail, postage prepaid, addressed to:

Kent Frates
Kurt M. Rupert
HARTZOG CONGER CASON & HARGIS
1600 Bank of Oklahoma Plaza/201 Robert S. Kerr
Oklahoma City, OK 73102

_____
/s/ John F. Fischer

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, for the use of B&D Mechanical Contractors, Inc., an Oklahoma corporation,

Plaintiff - Appellant,
Cross-Appellee,

v.

Nos. 94-6348
94-6355

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation; NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants - Appellees
Cross-Appellants.

ORDER
Entered December 11, 1995

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by appellees/cross-appellants.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

PATRICK FISHER, Clerk

/s/_____
By Opal A. Carter
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES for the use of B & D MECHANICAL CONTRACTORS, INC., an Oklahoma corporation,

Plaintiff,

vs.

No. CIV-94-254-W

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation, and NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants.

ORDER

This matter comes before the Court on the Motion to Dismiss and Motion to Consolidate filed by defendants North American Construction Corporation (NACC) and St. Paul Mercury Insurance Company (St. Paul). The plaintiff, United States f/u/o B & D Mechanical Contractors, Inc. (B&D), has responded in opposition to the motions and the defendants have replied. Based upon these submissions and the decision in Jim Cooley Construction, Inc. v. North American Construction Corp., No. CIV-93-1813-A (W.D. Okla. Dec. 10, 1993), the Court makes its determination.

B & D has alleged in this action a breach by NACC of a Subcontract Agreement executed by B&D and NACC. B&D has sought recovery against St. Paul, as surety for NACC, under the Miller Act, 40 U.S.C. § 270b.

The defendants have argued that dismissal of this action is warranted because venue is improper in this judicial district. In support of this argument, the defendants have relied upon Paragraph 35(C) of the Subcontract Agreement that provides

> "[t]he Subcontract Agreement and any claims arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas."

The plaintiff has argued that this forum selection clause should not be enforced because it is seeking payment for labor and services which are not the subject of the Subcontract Agreement, or any modification thereto, because the Miler Act and its venue provision override Paragraph 35(C) and because enforcement would be unreasonable under the circumstances.

In this connection, the plaintiff has contended that a portion of its claim against NACC is based upon labor and services provided under the terms of a letter dated August 27, 1993, which is a separate contract between the parties and which contains no forum selection clause. The record, however, demonstrates that the plaintiff's claim is based upon work performed pursuant to, and within the scope of, the Subcontract Agreement, or a modification thereto. The letter is not a second, separate contract between the parties and provides no basis to disregard the forum selection clause agreed to by the parties.

As stated, the plaintiff has also argued that section 270b(b) of the Miller Act controls the issue of venue in this matter. This section provides that suit shall be brought "in

the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U.S.C. §270(b). Case law, however, teaches that section 270b(b), which was enacted to benefit defendants, is not jurisdictional; its venue provisions may be waived or overridden by a valid forum selection clause.

Finally, the plaintiff has argued that it would be unreasonable to enforce Paragraph 35(C) in this case and to require the plaintiff to litigate this matter in Bexar County, Texas. Forum selection clauses are prima facie valid and are enforceable unless enforcement would be unreasonable. The plaintiff has not established that enforcement of the forum selection clause in the Subcontract Agreement would be unjust, arbitrary or contrary to law under the circumstances of this case.

Accordingly, the Court GRANTS the defendants' Motion to Dismiss filed July 6, 1994, and having determined the issue of venue to be dispositive of this matter, deems MOOT the defendants' Motion to Consolidate filed the same day.

ENTERED this 22nd day of August, 1994.

/s/_____
LEE R WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON 8-22-94

NORTH AMERICAN CONSTRUCTION CORP.

P.O. Box 690350
San Antonio, Texas 78269
(512) 492-8944

SUBCONTRACT AGREEMENT

Subcontract No. B-623-907 (CC 143)

Subcontractor's Employers Federal ID No. 731315801

Subcontractor's Average Annual Receipts for the Past Three (3) years 1,600,000.02

Number of Subcontractor's Full-Time Employees 10

THIS AGREEMENT, made this 7th day of April, 1992, by and between NORTH AMERICAN CONSTRUCTION CORPORATION, party of the first part, hereinafter called the "CONTRACTOR", and the below named party of the second part,

Name: B & D MECHANICAL [BOB BASSITT PHONE (405) 634-7425/FAX (405) 632-9744]

Address: 2330 S.W. 27th, OKLAHOMA CITY, OK 73108

hereinafter called the "SUBCONTRACTOR", which is a X Corporation, _____ Partnership, _____ Sole Proprietorship, _____ Other organized and existing under the laws of the State of Okla.

WITNESSETH

WHEREAS, the CONTRACTOR has heretofore entered into a contract, hereinafter referred to as the "ORIGINAL CONTRACT," dated SEPTEMBER 26, 1991 and described as Contract No. DACA56-91-C-0110 and more fully described as 3001 BUILDING GROUNDWATER TREATMENT SYSTEM/TINKER AFB, OK with the United States Government, hereinafter referred to as the "PRINCIPAL," which contract and all amendments includes the work described in Provision 36 (page 12) of this Subcontract Agreement to be completed by SUBCONTRACTOR under and in accordance with this Subcontract Agreement (Provisions 1 through 36 of pages 1 through 12). SUBCONTRACTOR is responsible for procuring all existing and future amendments.

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, the CONTRACTOR and the SUBCONTRACTOR do hereby mutually agree as follows:

* * * *

35. OTHER AGREEMENTS:

C. The Subcontract Agreement and any claims arising under it shall be governed by the Laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas.

* * * *

Supreme Court, U.S.
FILED
MAR 26 1996
CLERK

No. 95-1388

In The

Supreme Court of the United States

October Term, 1995

ST. PAUL MERCURY INSURANCE COMPANY AND NORTH AMERICAN CONSTRUCTION CORPORATION,

Petitioners,

v.

UNITED STATES FOR THE USE OF B&D MECHANICAL CONTRACTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 26, 1996

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

North American Construction Corporation ("North American") was the prime contractor for the installation of a groundwater treatment system at Tinker Air Force Base in Midwest City, Oklahoma (the "Project"). St. Paul Mercury Insurance Company ("St. Paul") furnished the payment bond to North American for the Project as required by 40 U.S.C. § 270a of the Miller Act. North American entered into a subcontract (the "Subcontract") with B&D Mechanical Contractors, Inc. ("B&D") to provide labor and services relative to the installation of a portion of the Project. B&D completed its work on the Project, but was not paid for $161,922.78 of the labor and services it provided. As a result, B&D sued North American and St. Paul under the Miller Act, 40 U.S.C. § 270a-c, in the United States District Court for the Western District of Oklahoma, the judicial district in which the Project is located.

Relying on a forum selection clause contained in the Subcontract, North American and B&D moved to dismiss B&D's Complaint for improper venue (App. 23). The District Court granted the motion of North American and St. Paul to dismiss, enforcing the forum selection clause contained in the Subcontract (App. 20).

The United States Court of Appeals for the Tenth Circuit reversed the decision of the District Court, and remanded the case for trial in the United States District

Court for the Western District of Oklahoma. In its opinion, the Tenth Circuit Court of Appeals adopted an argument advanced by St. Paul and North American, ruling that § 270b(b) of the Miller Act, requiring that suits be brought in the judicial district where the contract was performed "not elsewhere", is subject to contractual waiver by a valid forum selection clause. The Tenth Circuit Court of Appeals held, however, that the forum selection clause contained in the Subcontract was invalid because it purported to limit B&D to pursuing claims only in state court in Texas.[1] The Tenth Circuit Court of Appeals held that this limitation was fatal to the clause's enforceability because federal courts have exclusive jurisdiction over Miller Act claims.

The Tenth Circuit Court of Appeals held that although parties are permitted to contractually alter the Miller Act's venue provision, they cannot change its jurisdictional requirements. Moveover, the Tenth Circuit Court of Appeals refused to rewrite the forum selection clause contained in the Subcontract to provide for the transfer of the case to the Western District of Texas as an alternate forum as suggested by St. Paul and North American. The Tenth Circuit Court of Appeals concluded that the forum selection clause contained in the Subcontract, which attempted to divest the federal courts of their exclusive jurisdiction to adjudicate claims arising

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[1] St. Paul and North American interpreted the forum selection clause at issue in this case as limiting B&D to prosecuting a case in "a state court forum only". Accordingly, this was the construction of the forum selection clause actually advocated by St. Paul and North American.

under the Miller Act, was void and unenforceable. The Tenth Circuit therefore remanded the case to the United States District Court for the Western District of Oklahoma for trial (App. 6-7).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *RICH*

The arguments advanced by St. Paul and North American confuse established precedent holding that federal courts have exclusive jurisdiction to adjudicate Miller Act claims, with cases holding that the parties to a Miller Act claim have the ability to direct where such claims may properly be maintained. In essence, the argument of St. Paul and North American is that because the parties to a Miller Act claim can contractually agree to litigate their disputes in a federal forum different than that specified by § 270b(b) of the Miller Act, numerous state and federal cases holding that federal courts have exclusive jurisdiction over Miller Act claims are wrongly decided. In advancing this argument, St. Paul and North American ask no less than that this Court overturn over 30 years of precedent consistently holding that federal courts have exclusive jurisdiction over Miller Act claims simply because North American did a poor job of drafting the forum selection clause at issue in this case. St. Paul and North American arrive at the "conflict" they ask

this Court to resolve by confusing the distinct concepts of venue and exclusive federal jurisdiction over Miller Act claims, and by overstating the scope of this Court's holding in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974).

Throughout their Brief, St. Paul and North American repeatedly contend that the *Rich* decision either actually or implicitly overturned all existing federal case law holding that federal courts have exclusive jurisdiction over Miller Act claims.[2] However, St. Paul and North American notably never engage in an analysis of the *Rich* decision in support of this contention. St. Paul and North American fail to engage in an analysis of the *Rich* opinion precisely because this Court was not called upon in *Rich* to determine whether federal courts have exclusive jurisdiction over Miller Act claims as St. Paul and North American misleadingly suggest.

Although *Rich* is admittedly a Miller Act case, none of the parties argued that they should be permitted to litigate their Miller Act claims in a *state* forum. In fact, the facts of *Rich* do not even disclose the existence of a forum selection clause. In *Rich*, this Court determined only that a subcontractor on a government project located in California could maintain its Miller Act claim in a federal court in California despite the fact that one of several shipments of materials to the project were diverted by the

---

[2] For example, at page 8 of their Brief, St. Paul and North American contend that the Tenth Circuit's conclusion in this case that the Miller Act grants federal courts exclusive jurisdiction "is contrary to *Rich*."

contractor to another government project located in South Carolina.

In *Rich*, this Court ruled that despite the existence of the single diverted shipment of materials to South Carolina, the subcontractor could maintain its entire action in federal court in California because a sufficient nexus existed with the State of California for the satisfaction of the venue requirement of the Miller Act. This Court therefore concluded that the site for performance of the original contract remained the same for Miller Act purposes. *Id.* at 125.

Examining the purpose behind the Miller Act, this Court in *Rich* additionally noted that:

> Ordinarily, a supplier of labor or materials on a private construction project can secure a mechanic's lien against the improved property under state law. But a lien cannot attach to Government property, see Illinois Surety Co. v. John Davis Co., 244 U.S. 376, 380, 375 S.Ct. 614, 616, 61 L.Ed. 1206 (1917), so suppliers on Government projects are deprived of their usual security interest. The Miller Act was intended to provide an alternative remedy to protect the rights of these suppliers.

Id. at 122. Commenting on the "alternative remedy" provided by the Miller Act, this Court later in *Rich* stated that:

> The Miller Act provides a federal cause of action, and the scope of the remedy as well as

> the substance of the rights created thereby is a matter of federal not state law.

Id. at 127. Accordingly, the concept of exclusive federal jurisdiction over Miller Act claims is entirely consistent with this Court's pronouncement in *Rich*.

St. Paul and North American additionally make no effort to explain why this Court did not see fit to overrule or disapprove of earlier federal cases holding that federal courts have exclusive jurisdiction over Miller Act claims in *Rich*. *See, e.g., United States Fidelity & Guaranty Co. v. Hendry Corp.*, 391 F.2d 13 (5th Cir.), *cert. denied*, 393 U.S. 978 (1968) and *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499 (8th Cir. 1964) (J. Blackmun).

Nothing in the opinion of the Court of Appeals herein is in conflict with the holding of this Court in *Rich*, and the *Rich* opinion provides no basis to review the decision of the Court of Appeals in this case.

II.

STATE AND FEDERAL COURTS HAVE CONSISTENTLY HELD THAT FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER MILLER ACT CLAIMS

Building on their misleading interpretation of this Court's decision in *Rich*, St. Paul and North American next suggest the existence of a conflict among the circuits regarding whether federal courts have exclusive jurisdiction over Miller Act claims. St. Paul and North American suggest the existence of such a conflict despite the fact that in 28 pages of briefing they are unable to cite a *single case* wherein a federal court actually concludes that state

and federal courts have concurrent jurisdiction over Miller Act claims, or wherein a Miller Act claim was actually transferred to or litigated to a final resolution in a state forum.

In contrast to lack of any relevant authority supporting the position advocated by St. Paul and North American in their Brief, federal courts have repeatedly and consistently recognized the existence of exclusive federal jurisdiction over Miller Act claims. *See United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co.*, 297 F.2d 665, 667 (2nd Cir. 1962) ("40 U.S.C. § 270b(b) vests exclusive jurisdiction over suits on Miller Act bonds in the federal courts. . . . "); *United States ex rel. Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.*, 573 F.2d 245, 247 (5th Cir. 1978) ("jurisdiction over Miller Act claims is exclusively federal. . . . "); *Blanchard v. Terry & Wright, Inc.*, 331 F.2d 467, 469 (6th Cir.), *cert. denied*, 379 U.S. 831 (1964) ("Exclusive jurisdiction in the District Court was expressly conferred by the Miller Act."); *United States ex rel. Owens-Corning Fiberglass Corp. v. Brandt Construction Co.*, 826 F.2d 643, 645 (7th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) ("Federal courts have unanimously read this language [40 U.S.C. § 270b(b)] as establishing that jurisdiction of Miller Act claims is *exclusively* federal.") (emphasis in original); *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499, 506 (8th Cir. 1964) (J. Blackmun) ("we have no doubt that, as between a state court, on the one hand, and a federal court, on the other, the statute is jurisdictional in character and operation and places exclusive jurisdiction over Miller Act bond suits in the federal tribunal."); *United States ex rel. General Rock and Sand Corp. v. Chuska Development Corp.*, 55 F.3d

1491, 1493 (10th Cir. 1995) (the Miller Act "affords . . . suppliers 'the right to sue on [the] payment bond for the amount . . . unpaid at the time of institution of such suit,' *id.* § 270b(a), and grants the federal district courts exclusive jurisdiction over such actions, *id.* § 270b(b).").

St. Paul and North American attempt to cast doubt on the continued vitality of some of these decisions by arguing that they pre-date the decision of this Court in *Rich*, and that this fact somehow limits the analysis employed. Included among the cases offered by St. Paul and North American to support this contention is the decision authored by Justice Blackmun while a member of the Eighth Circuit Court of Appeals in *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499 (8th Cir. 1964). However, St. Paul and North American fail to disclose that this Court was undeterred by the fact that *Koppers* pre-dated *Rich* when it unanimously cited *Koppers* in 1983 as precedent providing an example of a statute granting exclusive jurisdiction to federal courts. *See Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 26 n.27 (1983). If the decision of the Eighth Circuit Court of Appeals in *Koppers* were limited by this Court's later ruling in *Rich*, as St. Paul and North American maintain, this Court would not have unanimously relied on the *Koppers* decision in 1983 to provide an example of a case addressing a situation in which a federal statute (the Miller Act) grants exclusive jurisdiction to the federal courts.

Noticeably absent from the Petition for Certiorari of St. Paul and North American are any state cases wherein state courts have interpreted the *Rich* decision in the manner advocated by St. Paul and North American. One

would assume that if St. Paul and North American were correct, and this Court's decision in *Rich* clarified that federal courts have only concurrent (as opposed to exclusive) jurisdiction over Miller Act claims, state courts would have been receptive to Miller Act claims brought in state court after 1974 (the year of the *Rich* opinion). In fact, the exact opposite is true.

Consistent with the federal decisions noted above, state courts have repeatedly and consistently *refused* to entertain Miller Act claims filed in state court, and have determined that such claims are exclusively federal in nature. In several of these cases, these courts have specifically rejected the arguments advanced by St. Paul and North American in their Petition for Certiorari. *See Balboa Insurance Co. v. Sippial Electric Co.*, 379 So.2d 579, 581 (Ala. 1980) ("state courts have consistently held that jurisdiction for claims against a Miller Act surety rests exclusively in federal court."); *Airport Construction and Materials, Inc. v. Bivens*, 279 Ark. 161, 649 S.W.2d 830, 832 (1983) ("We agree that this section [Section 270b(b)] indicates venue, but only in the context of venue within the federal system. It appears well settled that federal jurisdiction is exclusive on any Miller Bond suit."); *American Insurance Co. v. Kinder*, 640 S.W.2d 537, 539 (Mo. Ct. App. 1982) (rejecting the contention that 28 U.S.C. § 1352 creates concurrent jurisdiction in state courts to determine Miiler Act claims); *Nationwide Electric, Inc. v. Associated Bonded Construction Co.*, 557 A.2d 1224, 1225 (R.I. 1989) (finding state court lacked jurisdiction to entertain Miller Act claim because federal courts have exclusive jurisdiction over Miller Act claims and rejecting applicability of 28 U.S.C. § 1352 because purpose of Section 1352 was to

give federal courts jurisdiction of bond actions in dispute where the requisite diversity and minimum amount in controversy were lacking); *FMI Contracting Corp. v. Federal Insurance Co.*, 829 S.W.2d 907, 908 (Tex. Civ. App. 1992) ("Exclusive jurisdiction of suits under the Miller Act lies with the United States District Court.").

Further, one of the cases relied upon by St. Paul and North American to support their argument concerning the existence of a conflict among the circuits regarding the exclusivity of federal jurisdiction over Miller Act claims, *United States ex rel. Pittsburgh Tank & Tower, Inc. v. G&C Enterprises, Inc.*, 62 F.3d 35 (1st Cir. 1995), is not even on point. In *Pittsburgh Tank*, a subcontractor on a government project brought claims against the general contractor and the Miller Act surety in the federal court for the district in which the government project at issue was located. The contractor moved to dismiss the subcontractor's claim for improper venue, relying on a forum selection clause whereby the subcontractor agreed that venue of all suits arising against the contractor would be litigated in Burlington County, New Jersey. The First Circuit Court of Appeals affirmed the District Court's decision to dismiss the subcontractor's Complaint for improper venue, holding that the parties could contractually modify the venue required by the Miller Act. However, unlike the present case, neither party in *Pittsburgh Tank* interpreted the forum selection clause at issue to require that the subcontractor's claims be pursued in state court. In fact, the First Circuit Court of Appeals specifically noted that:

> although the forum selection clause here refers to a county that apparently contains no federal

> court, both parties have treated the clause as providing for venue in the federal district court for the district of New Jersey.

Id. at 36. Accordingly, the First Circuit Court of Appeals in *Pittsburgh Tank* was not called upon to determine whether federal courts have exclusive jurisdiction over Miller Act claims as St. Paul and North American misleadingly claim. Rather, because both parties in that case agreed that the subcontractor's claims could be pursued in federal district court in New Jersey, the issue was only whether the case could be transferred from one federal district court to another. The citation of this case by St. Paul and North American as somehow supportive of their Petition for Certiorari is therefore wholly without merit.[3]

The only other citation of authority arguably favorable to the position advocated by St. Paul and North American is the decision of the Eighth Circuit Court of Appeals in *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Dec. 4, 1995) (No. 95-1102).[4] However, the rulings of the Eighth Circuit Court of Appeals in *Carlow* are of little

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[3] Similarly, the Fifth Circuit Court of Appeals in *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979), cited at pages 10 and 11 of Petitioners' Brief, did not concern whether federal courts have exclusive jurisdiction over Miller Act claims. Again, the transfer at issue in *Fireman's Fund* was from the United States District Court for the Eastern District of Louisiana to the United States District Court for the District of New Jersey.

[4] The Petition for Certiorari filed in the *Carlow* case raises issues unrelated to those raised by St. Paul and North American herein.

application outside the particular facts and circumstances of that case.

In *Carlow*, FGS Constructors, Inc. was hired as a subcontractor to perform mechanical and structural work on a dam located on the Pine Ridge Indian Reservation. After various problems arose during the course of the project, FGS brought a diversity action in federal district court against the general contractor for breach of contract, against the Miller Act sureties for enforcement of the Miller Act bonds, and against the federal government for negligence. The district court dismissed the contract action against the general contractor, and determined that due to comity concerns and the sovereignty of the Oglala Sioux Tribe, the Tribe's tribal courts should be given the first opportunity to address FGS' claims against the general contractor and its sureties. The district court additionally ruled that the general contractor and its sureties had waived the Miller Act venue requirement by the language of a dispute resolution clause contained in the subcontract with FGS.

The quotation from the *Carlow* opinion relied upon by St. Paul and North American to support their argument is taken from that portion of the decision of the Eighth Circuit dealing with the dismissal of FGS' claims against the general contractor and the Miller Act sureties. Again, the district court grounded its dismissal of these claims on comity concerns and on FGS' failure to first exhaust any tribal court remedies FGS had against the general contractor and the sureties. In this factual setting, the Eighth Circuit rejected the district court's determination that FGS must first exhaust its remedies in tribal court. The Eighth Circuit Court of Appeals determined

that the contracting parties specifically agreed that FGS could sue either in federal district court in South Dakota, or in tribal court. The Eighth Circuit determined that the specific forum selection clause at issue revealed that the Oglala Sioux Tribe had agreed in advance that disputes need not be litigated in tribal court. Accordingly, the Eighth Circuit determined that there was no significant comity reason to defer the Miller Act litigation first to the tribal court.

Although the Eighth Circuit Court of Appeals agreed with the district court "that a federal court does not have exclusive jurisdiction over *these* Miller Act claims. . . . ", *id.* at 1233 (emphasis added), it reversed the decision of the district court. Concluding that the federal district court was "the usual forum for such claims and has a significant interest in determining the merits of the action," the Eighth Circuit remanded FGS' Miller Act claims for trial in the federal forum.

The Eighth Circuit, in *Carlow*, did not overrule, much less mention, its earlier case of *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499 (8th Cir. 1964), holding that federal courts have exclusive jurisdiction over Miller Act claims. The Eighth Circuit therefore obviously intended *Carlow* to be limited to the peculiar facts presented. In fact, the Eighth Circuit Court of Appeals recognized the limited nature of its holding later in the opinion when it stated:

> While the Miller Act venue requirement, requiring suits to be brought in the district where the contract was to be performed, served to benefit defendants and could be waived by defendants, *these rules and requirements have no relevance to*

> *this issue*. No provision in the agreement gave these defendants the right to override a plaintiff's choice of forum under the forum selection clause.

Carlow, 64 F.3d at 1233 (emphasis added).

Further, there does not appear to have been any attempt, as here, to deprive FGS of its right to have its Miller Act claims eventually litigated in federal court. The district court in *Carlow* dismissed FGS' federal claims due to its failure to first *exhaust* any available tribal court remedies. Presumably, had the district court's order been permitted to stand, FGS could have *returned to* federal court to adjudicate its Miller Act claims following the exhaustion of its tribal court remedies. Conversely, St. Paul and North American attempted to enforce a forum selection clause that they themselves have interpreted as permanently depriving B&D of its ability to bring claims in federal court either in Oklahoma or in Texas.

There is absolutely no reason for this Court to grant certiorari in this case. The Tenth Circuit Court of Appeals correctly determined that federal courts have exclusive jurisdiction over Miller Act claims, and its ruling in this regard is in accord with both state and federal case precedent spanning over thirty years. Further, this case does not merit a grant of certiorari given the fact that if St. Paul and North American wish to litigate future Miller Act claims in Texas brought by subcontractors on government projects located throughout the United States, they can easily revise their subcontract form to provide for exclusive jurisdiction in the United States District Court

for the Southern District of Texas. Accordingly, the contention of St. Paul and North American that this case involves important issues of federal law are overstated. The decision of the Tenth Circuit Court of Appeals in this case can easily be avoided through a simple contractual modification, and this case does not merit further review by this Court.

III.

28 U.S.C. § 1352 DOES NOT PROVIDE CONCURRENT STATE AND FEDERAL JURISDICTION OVER MILLER ACT CLAIMS

St. Paul and North American rest part of their argument concerning the existence of concurrent state and federal jurisdiction over Miller Act claims on 28 U.S.C. § 1352. This statute was enacted over 47 years ago. Since that time, it has never been used in the manner suggested by St. Paul and North American. In fact, St. Paul and North American fail to disclose that Justice Blackmun, writing for the Eighth Circuit Court of Appeals in *Koppers Co., Inc. v. Continental Casualty Co.*, 337 F.2d 499, 506 (8th Cir. 1964), specifically rejected the use of Section 1352 to create concurrent state and federal jurisdiction over Miller Act claims. In response to an identical argument raised in the *Koppers* case, Justice Blackmun deemed the argument "not persuasive":

> The purpose of § 1352 was to give federal courts jurisdiction of bond actions where, absent the necessary diversity and minimum amount in controversy, it otherwise did not exist. (Citation omitted.) It was not to provide state court jurisdiction over bond actions otherwise restricted to

> federal tribunals. Minneapolis-Honeywell Regulator Co. v. Terminal Constr. Corp., supra, p. 563 of 197 A.2d. See Revisor's note to 28 U.S.C.A. § 1352.

Koppers, 337 F.2d at 506.

Similarly, state courts which have considered this issue have uniformly rejected the application of 28 U.S.C. § 1352 as a basis for concurrent state and federal jurisdiction over Miller Act claims. *See Nationwide Electric, Inc. v. Associated Bonded Construction Co.*, 557 A.2d 1224, 1225 (R.I. 1989) (rejecting argument that Section 1352 provides concurrent state and federal jurisdiction over Miller Act claims); *American Ins. Co. v. Kinder*, 640 S.W.2d 537, 539 (Mo. Ct. App. 1982) (rejecting as unsound argument that Section 1352 results in jurisdiction in state courts for suits on Miller Act bonds).

The suggestion by St. Paul and North American that Congress intended to provide for concurrent state and federal jurisdiction over Miller Act claims through the enactment of 28 U.S.C. § 1352 is not only inaccurate, but has been expressly rejected by state and federal courts alike. Thus, this argument similarly fails to provide any basis for a grant of certiorari herein.

IV.

THE TENTH CIRCUIT'S INTERPRETATION OF THE FORUM SELECTION CLAUSE CONTAINED IN THE SUBCONTRACT IS OF NO IMPORTANCE BEYOND THE FACTS AND CIRCUMSTANCES OF THIS CASE

St. Paul and North American finally complain about the interpretation given the forum selection clause contained in the Subcontract by the Tenth Circuit Court of Appeals. St. Paul and North American fail to explain why their arguments in this regard serve as a basis for this Court to grant their Petition for Certiorari. In fact, this portion of their Brief actually skips this step, and argues the merits of their appeal, urging that the interpretation employed by the Tenth Circuit Court of Appeals "requires reversal."

Apart from the procedural infirmities of this portion of their Brief, St. Paul and North American fail to disclose that the interpretation given by the Tenth Circuit to the forum selection clause contained in the Subcontract was that urged by St. Paul and North American to be applied. St. Paul and North American, and not B&D, argued that the forum selection clause contained in the Subcontract limited B&D to the prosecution of claims against North American in the state court in Bexar County, Texas. St. Paul and North American therefore find fault with the Tenth Circuit's interpretation of the forum selection clause in a manner consistent with that argued by St. Paul and North American. Accordingly, St. Paul and North American are arguing that the decision of the Tenth Circuit Court of Appeals should be reversed because the

Tenth Circuit used the interpretation of the forum selection clause that St. Paul and North American argued should be applied.

Moreover, the offer of St. Paul and North American to permit the Tenth Circuit to rewrite the forum selection clause contained in the Subcontract to attempt to cure its infirmity by allowing B&D to prosecute its claims in the United States District Court for the Southern District of Texas did not occur until after St. Paul and North American became aware of the potential jurisdictional problems with the forum selection clause actually drafted by North American and included in the Subcontract. The Tenth Circuit Court of Appeals properly concluded that neither the Court of Appeals, nor North American and St. Paul should be permitted to rewrite the forum selection clause to benefit St. Paul and North American by curing it of its obvious jurisdictional infirmity, and that the forum selection clause was therefore void and unenforceable.

There is nothing about the Tenth Circuit Court of Appeals' interpretation or construction of the forum selection clause at issue in this case that conflicts with existing federal jurisprudence including the *Rich* case, or that merits further review by this Court. Accordingly, the Petition for Certiorari of St. Paul and North American should be denied on this basis as well.

CONCLUSION

This case does not merit further time or attention by this Court. Accordingly, the Petition should be denied.

DATED this 26th day of March, 1996.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 10 1996
CLERK

No. 95-1388

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ST. PAUL MERCURY INSURANCE COMPANY
and NORTH AMERICAN CONSTRUCTION
CORPORATION
Petitioners,

v.

B & D MECHANICAL CONTRACTORS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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B & D Mechanical Contractors, Inc. ("B & D") has filed a Brief in Opposition to St. Paul Mercury Insurance Company's and North American Construction Corporation's (collectively "North American") Petition for a Writ of Certiorari arguing in four propositions why the Writ should be denied. In light of Rule 15 of the Rules of the Supreme Court of the United States, what is most significant about B & D's Objection is the arguments which are not raised.

First, B & D does not challenge North American's explanation of the legislative history of the Miller Act. (See Petition 14-18). Nor does B & D argue that from that legislative history it should be concluded that federal courts have exclusive jurisdiction of Miller Act claims.

Second, B & D does not challenge North American's analysis and application of this Court's concurrent jurisdiction cases. (See Petition 18-22). Nor does B & D argue that these cases do not support the conclusion that state and federal courts have concurrent jurisdiction over Miller Act claims.

Third, B & D does not contend that a venue provision can simultaneously be jurisdictional. B & D cites no case holding that language from a venue statute such as 40 U.S.C. §270b(b) also creates jurisdictional requirements.

I.

B & D, nonetheless, argues that this Writ should be denied. Because B & D does not, and cannot, make any of the preceding arguments, B & D is left to argue that the

Writ should be denied because the issue has been resolved by "30 years of precedent consistently holding that federal courts have exclusive jurisdiction over Miller Act claims." (Brief 3).

There are two primary defects in this approach. The first deals with the 30 years of precedent relied on by B & D. The most prominent of those cases is this Court's decision in F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974) which "is admittedly a Miller Act case." (Brief 4). B & D must argue, however, that Rich does not decide the jurisdictional issue raised in this Petition because if Rich did decide that issue, B & D loses.

However, none of the other decisions relied on by B & D were decided by this Court. Rule 10(c) of this Court's Rules provides that one of the reasons this Court will exercise its discretion and grant certiorari is when an important federal question has not but should be decided by this Court. Consequently, if Rich has not decided the jurisdictional issue, no Supreme Court decision has, and this is a case of first impression. B & D's attempts to distinguish Rich, however unsuccessful, only support the granting of the Writ in this case.

The second defect in B & D's approach stems from its conclusion that because the Miller Act creates a federal right, as this Court observed at page 127 of the Rich decision, federal courts necessarily have exclusive jurisdiction over claims arising under that statute. (Brief 6). B & D's conclusion does not conform to existing precedent.

For example, in Tafflin v. Levitt, 493 U.S. 455 (1990), this Court concluded that Congress created a new federal right under the civil RICO statutes over which state and federal courts have concurrent jurisdiction. Likewise, in Main v. Thiboutot, 448 U.S. 1 (1980), this Court held that state and federal courts have concurrent jurisdiction over the federal right of action created by 42 U.S.C. §1983.

When deciding federal claims controlled by federal law, state courts are required to follow and apply federal law. Stone v. Powell, 428 U.S. 465, at 493-495, n. 35 (1976); see also, Allen v. McCurry, 449 U.S. 90, at 105 (1980). Consequently, there is nothing inconsistent in the concept of concurrent state court jurisdiction over federally created rights such as the Miller Act.

However, even if B & D's conclusion was legally sound, "there is no 'universal right to litigate a federal claim in a federal district court.'" Matsushita Electrical Industrial Co., Ltd. v. Epstein, ____ U.S. ____, 116 S. Ct. 873, 883 (1996). Epstein involved a claim arising under the 1934 Securities and Exchange Act over which federal courts indisputably have exclusive jurisdiction. 15 U.S.C. §78aa. In a prior state securities class action, the Epstein Respondents, as class members, had entered into a settlement which included the agreement to waive all claims, rights and causes of action, state or federal, including but not limited to claims arising under the federal securities law. This Court held that the Full Faith and Credit Act, (28 U.S.C. §1738), applied to the State Court judgment approving the settlement, and that the release precluded litigation of the class members' 1934 Act claims, even though the State

Court did not have jurisdiction to decide the merits of those claims. "[A] statute conferring exclusive federal jurisdiction for a certain class of claims does not necessarily require resolution of those claims in a federal court." Id.

The arbitration cases confirm this principle even where the exclusive jurisdiction of the federal courts over the federal claim is not in dispute. See, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985), holding that parties can agree to resolve federal antitrust claims before an arbitrator in Japan; and Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), holding that parties can agree to resolve 1934 Securities Act claims before an arbitrator in France. Most notably, this principal is confirmed in a non-arbitration case. See Bremen v. Zapata Off-Shore Company, 407 U.S. 1 (1972) holding that parties can agree to resolve federal admiralty claims in the courts of England.

Even if this forum selection clause resulted in the waiver of B & D's Miller Act claim neither B & D nor the Court of Appeals point to any case or legal principle which would preclude B & D from suing "on the subcontract under state law without the Miller Act claim." United States ex rel. Pittsburgh Tank & Tower v. G & C Enterprises, Inc., 62 F.3d 35 (1st Cir. 1995). However, this result should not obtain in this case because St. Paul, the bonding company, has consented to be sued on its bond in State Court in Texas.

Nonetheless, even if B & D's argument that federal courts have exclusive jurisdiction of Miller Act claims is accepted as correct, the decision of the Court of Appeals is

in conflict with Epstein and Bremen, among others, and there is reason to grant this Writ. Supreme Court Rule 10(c).

II.

Next, B & D argues that this Court has previously cited Koppers Co. v. Continental Casualty Co., 337 F.2d 499 (8th Cir. 1964), unanimously and with approval, as "an example of a case addressing a situation in which a federal statute (the Miller Act) grants exclusive jurisdiction to the federal courts." (Brief 8). The supporting reference is to footnote 27 of this Court's Opinion in Franchise Tax Board v. Construction Laborers' Vacation Trust, 463 U.S. 1 (1983). The reference, however, does not justify B & D's claim.

Koppers held that removal to federal district court of a Capehart Act bond case was improper under the principle of derivative jurisdiction. The Koppers court found that because federal courts had exclusive jurisdiction of Capehart Act claims, the state court lacked jurisdiction of the original case. Consequently, there was no properly filed case over which the federal court could acquire derivative jurisdiction on removal and the federal action was dismissed. The discussion of the history of the case, the issue on appeal and the effect of the derivative jurisdiction principle in removal cases appears at pages 501-502 of the Koppers opinion, the

same pages cited by this Court in footnote 27 of the Franchise Tax case.[1]

The remainder of the Koppers Opinion is directed toward the holding, announced at page 506, that federal courts have exclusive jurisdiction of Capehart Act bond claims. This holding is premised on the conclusions that: (1) Section 2(b) of the Miller Act (40 U.S.C. §270b(b) applies to the Capehart Act; and, (2) Section 2(b) of the Miller Act is a grant of exclusive jurisdiction to federal courts. Therefore, if footnote 27 of the Franchise Tax Opinion has the significance attached by B & D, it is, at best, curious that pages 501-502 would have been singled out rather than page 506.

Koppers clearly interprets Section 270b(b) to be a grant of exclusive jurisdiction to federal courts. It reaches this conclusion after acknowledging, at page 505 of the Opinion, that there was a split in the existing federal authority on this issue. The Koppers court apparently found the cases holding Section 270b(b) was jurisdictional to be more persuasive and adopted that position. However, one of those cases, United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co., 297 F.2d 665 (2nd Cir. 1962), was apparently misread by Koppers. Cf. United States ex rel. Capolino Sons, Inc. v. Electronic & Missile

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[1]Further, at the point in the Franchise Tax Opinion where footnote 27 appears, the issue under discussion was whether ERISA preempted otherwise available state court claims based on the same subject matter. B & D has never claimed that the Miller Act preempts any similar state court breach of contract claim. In fact, B & D has included in its Complaint a pendent state law breach of contract claim. (App. 3).

Facilities, Inc., 364 F.2d 705, at 707 (2nd Cir. 1966), *cert. dismissed,* 385 U.S. 924.

If the question is the importance of this Court's reference to decisions from the Courts' of Appeals, North American maintains that the significant reference relevant to the issue raised by this Petition is in Rich. When holding, at page 125, that Section 270b(b) was "merely a venue requirement," this Court cited as support for that proposition the Missile Facilities decision (see n. 10), not Koppers and not Bryant Electric.

III.

The remaining arguments asserted by B & D raise no new issues or require no further comment except as follows. At page 17 of its Brief, B & D points out that the parties to this forum selection clause disagree as to its meaning. This merely confirms that the Court of Appeals improperly engaged in fact finding to reach its result. The intent of the parties with respect to the meaning of this provision was not an issue raised in the trial court nor was it one concerning which any evidence was introduced. The issue was first raised on appeal by B & D. This aspect of the Court of Appeals' decision is appropriate for review under Rule 10(a) and (c).

Further, B & D claims that North American first offered to litigate in the appropriate federal district court in Texas after it "became aware of the potential jurisdictional problems." (Brief 18). That is correct, however, North American first offered this alternative at oral argument when

B & D first raised its jurisdictional argument. Prior to that point, B & D had argued (1) that there were two contracts at issue, only one of which contained a forum selection clause; (2) North American's 12(b)(3) Motion to Dismiss should be treated as a Section 1404(a) motion to transfer; (3) the forum selection clause was superseded by the Miller Act's venue provision; and, (4) enforcement of the forum selection clause would be unreasonable. North American's "offer" was made to avoid a result by which B & D might lose its Miller Act claim because it filed its action in the wrong court.

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